IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 7

BRUCE BOYNTON,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

No opinion was rendered in this case by the Supreme Court of Appeals of Virginia when it denied the petitioner a writ of error to the judgment of the Hustings Court of the City of Richmond on the 19th day of June, 1959. No opinion was rendered by the Hustings Court of the City of Richmond on the 20th day of February, 1959, when it found petitioner guilty of a violation of §18-225 of the Code of Virginia, 1950, as amended.

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was rendered on the 19th day of June, 1959 and

stay of execution and enforcement of the judgment of said Court was granted on the 24th day of July, 1959 staying the execution and enforcement of same until the 17th day of September, 1959, unless the case would before that time be docketed in this Court in which event enforcement of said judgment should be stayed until the final determination of this case by this Court. On February 23, 1960, this Court granted a petition for writ of certiorari from the Supreme Court of Appeals of the Commonwealth of Virginia. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Questions Presented

1.

Whether the criminal conviction of plaintiff, an interstate traveler, for refusing to leave an interstate bus terminal restaurant where he sought refreshment at a regularly scheduled stop in the course of his interstate journey and was barred solely because of his race, is invalid as a burden on interestate commerce in violation of Article I. §8, Clause 3 of the United States Constitution.

2.

Whether said conviction violates the due process and equal protection clauses of the I4th Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved

This case involves:

Article I, §8, and the due process and equal protection clauses of the XIV Amendment of the Constitution of the United States.

§18-225 of the Code of Virginia of 1950. This statutory provision is set forth in the Statement, *infra*, p. 4.

Statement

At 10:40 P. M. on December 20th, 1958, Bruce Boynton, petitioner, stepped off a Trailways bus from Washington, D. C., at the Trailways Bus Terminal in Richmond, Va., for a forty minute layover. Petitioner, a Negro student at the Howard University School of Law in Washington, was hungry and anxious to get something to eat before reboarding the bus to continue on to his home in Selma, Alabama, by way of Montgomery (R. 27-28).

He first looked into a small restaurant and noticed that it was crowded with colored patrons. Since his time was limited, he went on to another restaurant within the terminal, which was practically empty, adjacent to the waiting room (R. 28). He entered and sat on a vacant stool at the counter. A white waitress immediately approached and informed him that she had orders not to serve people of his race. She advised him to use the colored facilities. Petitioner explained that he would like to be served before his bus, which was scheduled to leave shortly, departed. To insure quick service he ordered a prepared sandwich and a cup of tea. But the waitress disregarded his order, departed for a while and returned to repeat that it was customary not to serve Negroes in that particular restaurant (R. 29).

Petitioner asked to speak to someone who could wait on him, pointing out that he was an interstate passenger with a cross-country ticket purchased in Washington, D. C. (R. 29). At this point the assistant manager intervened "to explain to him the situation" (R. 21) and to demand that petitioner leave. Petitioner refused to move. The assistant manager's response was to have petitioner arrested (R. 21, 29). Petitioner's baggage was removed from the bus on which he had expected to continue his journey, and peti-

tioner himself was taken away in a patrol wagon, charged with a violation of §18-225 of the Code of Virginia of 1950 as amended, which provides:

> "If any person shall without authority of law go upon or remain upon the lands or premises of another after having been forbidden to do so by the owners, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign, or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $100.00 or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

The bus terminal was owned and operated by Trailways Bus Terminal, Inc. (R. 9-17). The restaurants therein were built into the terminal upon its construction and leased by Trailways to Bus Terminal Restaurant of Richmond, Inc. (R. 9-17). The lease gave exclusive authority to the lessee to operate restaurants in the terminal, required that they be conducted in a sanitary manner, that sufficient food and personnel be provided to take care of the patrons, that prices be just and reasonable, that equipment be installed and maintained to meet the approval of Trailways, that lessee's employees be neat and clean and furnish service in keeping with service furnished in an up-to-date, modern bus terminal; prohibited the sale of alcoholic beverages on the premises; and permitted cancellation of the lease upon the violation of any of its conditions (R. 9-17).

Petitioner was convicted in the Police Court of the City of Richmond and fined $10.00, which conviction was appealed to the Hustings Court of the City of Richmond

which affirmed (R. 31).[1] Petition for writ of error to the Supreme Court of Appeals was rejected, the effect of which was to affirm the judgment of the Hustings Court (R. 32). The affirmance by the Supreme Court of Appeals of Virginia, appears in the Record at p. 32. In the Hustings Court of the City of Richmond petitioner objected to the criminal prosecution on the grounds that it contravened his rights under the Commerce Clause of the United States Constitution (Article 1, Section 8) and the Interstate Commerce Act (Title 49 U.S.C., Section 316(d)) and that he was thereby denied due process and equal protection of the laws secured by the Fourteenth Amendment to the United States Constitution (R. 6-7). Said objections were renewed by notice of appeal and assignment of error to the Supreme Court of Appeals of Virginia (R. 5). These defenses, however, as aforesaid, were rejected at all stages of the litigation without opinion. On February 23, 1960 this Court granted petitioner's petition for writ of certiorari to the Supreme Court of Appeals of Virginia.

Summary of Argument

The arrest and conviction of petitioner burdened interstate commerce. That the terminal in question is stationary does not exempt the burden there effected from the general rule. Even if petitioner's arrest and conviction for insisting upon nonsegregated dining service might somehow be viewed as "private action," the Commerce Clause also forbids privately imposed burdens on interstate com-

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[1] Petitioner, at the time of arrest, was a law student at Howard University. Since then he has been graduated, and on February 16, 1960, took the Alabama bar examination. While others who took the examination with him already have been admitted to the bar, petitioner's status has not yet been declared. He is under an investigation, he has been informed, which concerns this conviction.

merce. But the arrest and conviction here supply requisite state action should that be required. Congress has expressed no specific intent concerning an arrest and conviction like petitioner's, but should congressional intent be found in the Motor Carriers Act, that Act, read in a context of relevant constitutional law, indicates intent that this burden not be permitted.

Judicial enforcement of private racial discrimination violates the 14th Amendment. This has been made clear, among other places, in cases of arrest for exercise of constitutional rights in public places although possessory interest to these places actually may lie with private individuals, or corporations. Petitioner's conviction is not a reasonable exercise of police power necessary to maintain law and order. In fact, petitioner's act would not have been criminal at common law, in almost all of the other states of the Union, in England, or in the Commonwealth countries, except South Africa where similar law is directed solely at Natives.

Argument

Introductory

The statute involved

Virginia's police, in the circumstances related above, by application of a trespass statute, have halted petitioner's interstate journey, forced him to disembark and remove his baggage from the interstate bus which carried him from Washington, D. C. en route to his home in Alabama, and have brought him before the Virginia courts which have adjudged him guilty of crime. The statute is set forth *supra*, p. 4.

This statute apparently has been interpreted by the Virginia courts but once. *Hall* v. *Commonwealth*, 188 Va.

72, 49 S.E. 2d 369 (1948), app. dism. 335 U.S. 875, upheld its applicability to Jehovah's Witnesses who persisted in going past the receptionist of a private apartment house into its corridors to solicit tenants, contrary to regulations, concurred in by tenants and management, which required invitation of a tenant for permission to enter the hallways. The Supreme Court of Virginia, holding the regulation "valid and reasonable," 188 Va. at 90, 49 S.E.2d at 378, ruled that state and federal constitutional rights of free speech, press, and assembly had not been denied.

There are other Virginia trespass cases, involving similar, earlier statutory law, and statements of the common law of Virginia, which help further place this statute in a context of the State's law. The general rule seems to be, as at English common law, that an intrusion made under claim of right, which may give rise to civil suit, is not a misdemeanor. *Wise* v. *Commonwealth*, 98 Va. 837, 36 S.E. 479 (1900); *Dye* v. *Commonwealth*, 48 Va. (7 Grat.) 662 (Va. Gen. Ct., 1851); and that before criminal liability attaches there must be a breach of the peace, *Henderson* v. *Commonwealth*, 49 Va. (8 Grat.) 708 (Va. Gen. Ct., 1852);[2] *Commonwealth* v. *Israel*, 31 Va. (4 Leigh) 675 (Va. Gen. Ct., 1833); *Miller* v. *Harless*, 153 Va. 228, 149 S.E. 619 (1929).[3]

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2 See *Henderson* v. *Commonwealth*, 49 Va. (8 Grat.) 708, 710 (Va. Gen. Ct., 1852): "It is abundantly clear that the mere breaking and entering the close of another, though in contemplation of law a trespass committed *vi et armis*, is only a civil injury to be redressed by action: and cannot be treated as a misdemeanor to be vindicated by indictment or public prosecution. But when it is attended by circumstances constituting a breach of the peace, such as entering the dwelling house with offensive weapons, in a manner to cause terror and alarm to the family and inmates of the house, the trespass is heightened into a public offense, and becomes the subject of a criminal prosecution." Citing *Rex* v. *Storr*, 3 Burr. 1698. See statement of the general rule in 63 C.J.S. 1075, to the same effect.

3 In many states there apparently are no statutes under which Boynton would have been convicted for trespass: See Arizona, Colorado, Idaho, Iowa, Kansas, Louisiana, Missouri, Montana, New Mexico, North Dakota, Pennsyl-

But, as indicated above, such holdings have not been employed by Virginia in its sole interpretation of §18-225.

Issues Presented by the Statute as Applied

Petitioner raises two principal constitutional defenses, the Commerce Clause (Article I, §8, cl. 3), and the Equal Protection and Due Process Clauses (Fourteenth Amendment), against the asserted power of Virginia to convict him under this statute in the circumstances of his interstate

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vania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, and Wisconsin. *Cf.* the following states where statutes probably would not be applicable to Boynton's acts: California, West's Code Annot., 1955, Tit. 14, Sec. 602, para. 1 (entering and occupying structures); Kentucky, Rev. Stats., 1959, Sec. 433.380 (trespass hindering conduct of commerce); Maine, Rev. Stats., 1959, c. 131, Sec. 39 (willful entry on land commercially used, but referring to land without buildings); Maryland, Annot. Code, 1957, Art. 27, Sec. 577 (wanton entry after warning involving high degree of criminal intent); Mississippi, Annot. Code, 1942, Tit. 1., Sec. 2411 (remaining on inclosed land of another after warning); Nebraska Rev. Stats., 1956, Tit. 28, Sec. 589 (refusal to depart from enclosure after request); New Jersey, Annot. Stats., 1951, Tit. 2A, Sec. 170-31 (trespass on lands; totally rural context); Oklahoma, West's Stats. Annot., 1958, Tit. 21, Sec. 1353 (intrusion on lot or piece of land; not in sense of buildings); and West Virginia, Code, 1955, Sec. 5974 (entry upon inclosed lands after being forbidden).

In other states where perhaps applicable trespass laws do exist, it is questionable whether under existing interpretations he would have been convicted, for clearly he was in the Trailways Terminal under a claim of right, which ordinarily exempts the intrusion from the category of criminal trespass. There are no reported cases in these states which would differentiate between a claim of constitutional or other federal right and one of traditional "property" right. Such differentiation would, of course, raise constitutional questions of equal protection. See Florida, West's Stats. Annot., 1944, Tit. 44, Sec. 821.01 as interpreted in *Boykin* v. *State*, 40 Fla. 484, 24 So. 141 (1898) and 1953-54 Op. Atty. Gen. 649. In Georgia, until recently the law was stated by: Georgia, Annot. Code, 1959, Sec. 26-3002 as interpreted in *Murphey* v. *State*, 115 Ga. 201, 41 S.E. 685 (1902) and *Wiggins* v. *State*, 119 Ga. 216, 46 S.E. 86 (1903); this now has been superseded by H.B. 1112, Act No. 497, 1960 General Assembly (trespass after refusal to leave); Indiana, Burns Stats. Annot., 1956, Tit. 10, Sec. 4506 as interpreted in *Myers* v. *State*, 190 Ind. 269, 130 N.E. 116 (1921); Massachusetts, Michie's Annot. Laws, C. 266, Sec. 120 as interpreted in *Commonwealth* v. *Richardson*, 313 Mass. 632, 48 N.E.2d 678 (1943); New York, McKinney Laws, Art. 182, Sec. 2036 interpreted in *People* v. *Stevens*, 109 N.Y. 159, 16 N.E. 53 (1888); Ohio, Page's Rev. Code Annot.

journey related above. This conflict manifests once more the recurring theme which juxtaposes in the courts claims of federally protected personal liberty against state en-

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Sec. 2902.21 as interpreted in *State* v. *Largson*, 72 Ohio L. Abs. 211, 143 N.E.2d 502 (1956); and Wyoming, Michie's Stats. Annot., 1957, Sec. 6-226 applying Indiana cases, see *Myers* v. *State*, *supra*, since derived from Indiana statute.

Cf. Alabama, Code, 1940, Title 14, Sec. 426 and "legal cause or good excuse" and Illinois Rev. Stats., 1959, Tit. 38, Sec. 565 as interpreted in *People* v. *Miller*, 344 Ill. App. 574, 101 N.E.2d 874 (1951). In several states the problem of the defense of claim of right has not received judicial consideration; as to these states it may be argued that the common law defense of bona fide, reasonable claim of right would be upheld if asserted. See Alaska, Laws Annot., 1958, Sec. 65-5-112; Connecticut, Gen. Stats. Rev., 1958, Sec. 53-103; District of Columbia, Code Annot., 1956, Sec. 22-3102; Hawaii, Rev. Laws, 1955, Sec. 312-1; Michigan, Stats. Annot., 1954, Sec. 28.820(1); Minnesota, Stats. Annot., 1947, Sec 621.57; Nevada, Rev. Stats., 1957, Sec. 207.200; New Hampshire, Rev. Stats. Annot., 1955, Sec. 572:50; Oregon, Rev. Stats., Sec. 164.460; and Washington, Rev. Code, 1957, Sec. 9.83.060.

In the following states Boynton would probably have been found guilty: Arkansas, Rev. Stats., 1959, Secs. 71-1801, 1802, 1803 (emergency acts designed specifically to counteract sit-in situations); Delaware, Code Annot., 1953, Tit. 11, Sec. 871 (claim of ownership only defense); North Carolina, Gen. Stats., Tit. 14, Sec. 134 as interpreted in *State* v. *Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958); and South Carolina, Code of Laws, 1959, Sec. 16-386 (originally directed at Negroes after Civil War, see *State* v. *Cookfield*, 15 Rich. (49 S.C.L.) 53 (1867)).

In England and the Commonwealth countries, Boynton's deed would not have been a crime; see cases requiring breach of peace or use of actual force to make trespass indictable, *R.* v. *Storr*, 3 Burr. 1698, 97 E.R. 1053 (1765); *R.* v. *Blake et al.*, 3 Burr. 1731, 47 E.R. 1070 (1765); and *R.* v. *Watson*, Term Rep. 357, 101 E.R. 1432 (Kingston Assizes, 1789); except in South Africa where the relevant statute specifically is directed at the Natives. See Natives (Urban Areas) Consolidation Act of 1945, Sec. 9, para. 9, as provided by Sec. 29, para. e of Native Laws Amendment Act, No. 36 of 1957. *Cf.* also Prevention of Illegal Squatting Act, No. 52 of 1951, Sec. 1 with interpretation thereof in *R.* v. *Phiri* (4) S.A. 708 (T) (1954) and commentary thereon in 72 South Af. L.J. 125 (1955). The only other Commonwealth countries in which Boynton might have been tried probably would have acquitted him on the basis of his defense of entry under a bona fide claim of right: See New Zealand, Police Offences Amendment Act (No. 2) No. 43 of 1952, Sec. 3 as interpreted in *Ryan* v. *Stanford*, 15 N.Z.L.R.C.A. 390 (1897), *James* v. *Butler*, 25 N.Z.L.R.C.A. 653 (1906) and *Greenaway* v. *Hunt and Heggery* [1922] N.Z.L.R. 55 [1921], G.L.R. 673; Victoria, Australia, Police Offences Act, No. 6337 of 1958, Sec. 20 as interpreted in *Falkingham* v. *Fregon*, 25 V.L.R. 211, 21 A.L.T. 123 (1899); and Tasmania, Trespass to Lands Act, 1862, as interpreted in *Gripps* v. *Gripps*, 20 Tas. L.R. 47 (1924).

forcement of alleged private property right, by criminal law or otherwise. Or, to rephrase the matter, the problem is one of how far certain claimed private property rights extend. Such controversy, in recent years, has arisen in various forms.

Where Jehovah's Witnesses were convicted of trespass for having distributed literature on the premises of a company-owned town contrary to the wishes of the town's management, *Marsh* v. *Alabama*, 326 U.S. 501, Mr. Justice Black, for the Court, wrote that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional right of those who use it. . . ." at p. 506 and "[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position," at p. 509. Conviction was reversed. In *Martin* v. *Struthers*, 319 U.S. 141, this Court held unconstitutional an ordinance which made unlawful ringing doorbells of residences for the purpose of distributing handbills, upon considering the free speech values involved—"[d]oor to door distribution of circulars is essential to the poorly financed causes of little people," at p. 146—and that the ordinance precluded individual private householders from deciding whether they desired to receive the message. But in effecting "an adjustment of constitutional rights in the light of the particular living conditions of the time and place", *Breard* v. *Alexandria*, 341 U.S. 622, 626, the Court, assessing a conviction for door-to-door commercial solicitation involving various popular magazines, contrary to a "Green River" ordinance, concluded that the community "speak[ing] for the citizens," 341 U.S. 644, might convict for crime in the nature of trespass. The decision turned

upon balance of the "conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." 341 U.S. at 644. Because, among other things, "[s]ubscription may be made by anyone interested in receiving the magazines without the annoyances of house to house canvassing," *ibid.*, the judgment was affirmed.

The ordinarily unchallenged right of real property owners to fasten covenants on their land has been circumscribed to the extent that the Fourteenth Amendment prohibits enforcing of racial restrictive covenants by injunction, *Shelley* v. *Kraemer*, 334 U.S. 1, or damages, *Barrows* v. *Jackson*, 346 U.S. 249.

A like collision between federal rights, this time conferred by the National Labor Relations Act, and rights in real property defined by state law, also has called for reconciliation in this Court. *Republic Aviation, Inc.* v. *N. L. R. B.*, 324 U.S. 793, upheld the validity of National Labor Relations Board rulings that, lacking special circumstances that might make such rules necessary, employer regulations forbidding all union solicitation on company property regardless of whether the workers were on their own or company time, constituted unfair labor practices. In assessing the regulations, Justice Reed balanced the employer's right to maintain discipline with the employees' right to organize; no weight was given to the employer's property right, mentioned solely at 324 U.S. 802, note 8.[4] Similarly a Baltimore City Court, *State of Maryland* v. *Williams*, 44 Lab. Rel. Ref.

[4] See also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F.2d 258 (8th Cir., 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F.2d 593, 598 (D.C. Cir., 1956) (reversed on other grounds) 357 U.S. 357. ("Our attention has not been called to any case under the Wagner Act or its successor in which it has been held that an employer can prohibit either solicitation or distribution of literature by employees simply because the premises are company property.

Man. 2357, 2361 (1959) has on Fourteenth Amendment and Labor Management Relations Act grounds, decided that pickets may patrol property within a privately owned shopping center.[5]

The Commerce Clause too has been interposed by the courts between private proprietors of interstate carriers and passengers who resisted racial segregation on those carriers by rule of the management. *Whiteside* v. *Southern Bus Lines*, 177 F.2d 949 (6th Cir., 1949); *Chance* v. *Lambeth*, 186 F.2d 879 (4th Cir., 1951), cert. den., 341 U.S. 941. And the Fourteenth Amendment forbids police to arrest those who violate an intrastate carrier's private racial seating regulation, where to violate management's seating rule is a crime. The statute did not mention race. *Boman* v. *Birmingham Transit Co.*, No. 18187, July 12, 1960, Fifth Circuit.

In such cases the approach of the courts has been infused with an awareness, as Mr. Justice Frankfurter wrote, concurring in *Marsh* v. *Alabama*, 326 U.S. 501, 510, that "when decisions by State courts involving local matters are so interwoven with the decision of the question of Constitutional rights that the one necessarily involves the other,

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Employees are lawfully within the plant, and nonworking time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.")

Compare *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U.S. 240, 252 (employees seized plant; discharge held valid: "high-handed proceeding without shadow of legal right").

5 See also *People* v. *Barisi*, 193 Misc. 934, 86 N.Y.S.2d 277, 279 (1948) (picketing within Pennsylvania Station not trespass; owners have opened it to public and their property rights are 'circumscribed by the constitutional rights of those who use it.'"); *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man 2334 (1959) (shopping center owner denied relief against picketers on is property; relying on Fourteenth Amendment).

State determination of local questions cannot control the Federal Constitutional right."[6]

Therefore, here, the essential right of the management of the Trailways Terminal restaurant to enforce segregation of interstate passengers by means of the full force of the Commonwealth of Virginia, asserted through its police and courts, must be weighed against the claim of petitioner, an interstate traveler, to freedom of movement without being hobbled by racial distinction in the course of an interstate journey (Article 1, §8), and his further claim to be free of arrest and conviction in the Virginia courts in the enforcement of such racial rules (Fourteenth Amendment). Petitioner submits that under our Constitution this conflict can be resolved only in the interest of freedom of movement among the states and freedom from criminal conviction in the state courts to enforce racial discrimination.

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[6] For a related conclusion in a different constitutional context see, *Jones v. United States*, —— U.S. ——, —— (1960) ("... it is unnecessary and ill-advised to impart into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. ... Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 4 L.ed.2d 697 at 705.

I.

The decisions below conflict with principles established by decisions of this Court by denying petitioner, a Negro, a meal in the course of a regularly scheduled stop at the restaurant terminal of an interstate motor carrier and by convicting him of trespass for seeking nonsegregated dining facilities within the terminal.

In this context we approach petitioner's first contention that his arrest and conviction disrupted his interstate journey in a manner violative of Article I, §8, cl. 3:

> ["E]ver since Gibbons v. Ogden, 9 Wheat. (US) 1, 6 L.ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority . . . "

wrote Chief Justice Stone in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767.

In that case the Arizona Train Limit Law, which limited the size of trains to fourteen passenger or seventy freight cars was held violative of the Commerce Clause. The law required that interstate rail transport be disrupted in Arizona to adjust the length of trains to that state's demand. The "state interest [was] outweighed by the interest of the nation in an adequate economical and efficient railway transportation service, which must prevail." 325 U.S. at 783-84. Of a piece with the *Southern Pacific* decision, and more intimately related to the suit at bar, was *Morgan* v. *Virginia*, 328 U.S. 373, which held unconstitutional, under the Commerce Clause, Virginia's segregated seating statute as applied to an interstate bus passenger.

"On such interstate journeys, the enforcement of the requirements for reseating would be disturbing." 328 U.S. at 381. " . . . [S]eating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel." *Id.* at 386. And the disturbing effect of segregated seating in dining service was recognized by this Court in *Henderson* v. *United States*, 339 U.S. 816, 825, which, while dealing with the Interstate Commerce Act, condemned racial segregation in railroad dining cars as "emphasiz[ing] the artificiality of the difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility."

Only last year, the vigor of the *Morgan* and *Southern Pacific* cases was reaffirmed in *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, which cited both with approval at pp. 526 and 528, and concluded that Illinois's mud-flap regulation was a burden on interstate commerce: "state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must . . . bow." 359 U.S. at 529.

The Richmond Trailways Terminal is, of course, itself, a stationary accommodation. But clearly it is now settled that a facility need not be in motion to come under the Commerce Clause. An interstate bus terminal restaurant, built as an integral part of the terminal structure, is as much a part of interstate commerce, as, for example, a stockyard for the care and feeding of cattle during a pause in their interstate movement. See *Stafford* v. *Wallace*, 258 U.S. 495, 519, in which Chief Justice Taft wrote that

> "this court declined to defeat the purpose [of the Commerce Clause] in respect of such a stream, and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when

> considered alone and without reference to their association with the movement of which they were an essential but subordinate part."

Indeed, *Hall* v. *DeCuir*, 95 U.S. 485, struck down a statute forbidding racial distinctions on a steamboat even though the situation at bar involved an *intra*state trip. The law, it was held, interfered with interstate voyages.

Pursuant to this view the Court has held that " . . . warehouses engaged in the storage of grain for interstate or foreign commerce are in the federal domain . . . ," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 229; and that a transaction with a redcap during a stop at a railroad station is within the same jurisdiction, *N.Y. N.H. & H. R. Co.* v. *Nothnagle*, 346 U.S. 128, 130.[7] Petitioner submits, therefore, that in determining the standards which the terminal and the restaurant, which was an integral part of it, must meet under the Commerce Clause, the same rules must apply, for purposes of this case, as would be applied to a moving bus.

It has been argued that the Commerce Clause does not reach rules of carriers which have no origin in state law. A like argument was made in *Re Debs*, 158 U.S. 564, 581. To this, the opinion of the Court replied:

> "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision

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7 See also *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 228. *Sprout* v. *South Bend*, 277 U.S. 163, 168. And see also *Kirschenbaum* v. *Walling*, 316 U.S. 517 (commerce power, expressed in the Fair Labor Standards Act, as interpreted in that case, reached employees of a loft building whose tenants were principally engaged in interstate commerce). All of these are cases which hold that the commerce power extends sufficiently far to uphold federal regulation of activities, which themselves, actually do not move among the States.

has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

Here, however, we have, in addition, police arrest and court conviction. Concerning such circumstances, in a background of racial discrimination in interstate travel, two Courts of Appeals have held the racial restriction unconstitutional. The Fourth Circuit has written:

"Under *the company's regulations*, the three coaches first in line were designed for Negro passengers and the next two for white passengers . . . " (Emphasis supplied.)

"At Richmond, the *trainmen* segregated the passengers . . . The regulations of the company upon which the decision of the case turns were issued to the trainmen . . . " (Emphasis supplied.)

"It is true that the regulation of the carrier was not enacted by state authority, although the power of the state is customarily involved to enforce it, but we know of no principle of law which requires the courts to strike down a state statute which interferes with interstate commerce but to uphold a railroad regulation which is infected with the same vice."

Evance v. *Lambeth*, 186 F.2d 879, 880, 883 (4th Cir. 1951), ert. denied 341 U.S. 941, Parker, Soper, Dobie, *JJ.*

And, in *Whiteside* v. *Southern Bus Lines*, 177 F.2d 949, 52 (6th Cir., 1949), the Sixth Circuit held, per Hicks, imons and McAllister, *JJ.*, that

"appellant here boarded an interstate conveyance in Illinois which has neither statute, decision or custom sanctioning or requiring segregation based upon race or color. The requirement [of the carrier] that she change her seat with all her accompanying impedimenta the moment she crossed the Kentucky line, was a breach of the uniformity which under the Morgan case, is a test of the burden placed upon interstate commerce.

"It must also be observed that acts burdening interstate commerce are not, like those inhibited in the Fourteenth Amendment, limited to state action. Burdens may result from the activities of private persons as the great mass of federal criminal legislation validated under the authority of the Commerce Clause, discloses. But, if state action is a prerequisite to the invalidity of the regulation here considered as it was applied to the appellant, state action is clearly to be perceived in the ejection of the appellant by a state police officer."[8]

Here we have similar elements which compel a conclusion that halting Boynton's journey violated the Commerce Clause: A racial impediment to reasonably secur-

8 To the extent that requisite state involvement is supplied by police enforcement of an intrastate carrier segregation regulation, the Fifth Circuit, in passing on a Fourteenth Amendment contention recently has arrived at a similar result. *Boman* v. *Birmingham Transit Co.*, No. 18187, July 12, 1960, Fifth Circuit, Tuttle and Wisdom, *JJ.* (Cameron, *J.*, dissenting), held that "so long as such an ordinance [committing seating arrangements to the driver] was in force, *the acts of the Bus Company* in requiring racially segregated seating were state acts and were thus violative of the appellant's constitutional rights. . . ." (Emphasis supplied.)

"Of course, the simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons would not effect a denial of [Fourteenth Amendment] constitutional rights if not enforced by force or by threat of arrest and criminal action."

ing meal service in the manner of white passengers in the course of an interstate journey, in an interstate terminal restaurant constructed and maintained for the purpose of facilitating interstate commerce; an interruption of the interstate journey, complete and decisive; and, should state involvement be required for application of the Commerce Clause, invocation of state statute to enforce the racial rule and the full intervention of Virginia police and courts to uphold it.

In *Southern Pacific* v. *Arizona*, 325 U.S. 761, 768, Chief Justice Stone, writing of the limitations which the Commerce Clause places upon activities which burden interstate commerce, stated—"[w]hether or not this long recognized distribution of powers between the national and the state governments is predicated upon the implication of the commerce clause itself [citations omitted]; or upon the presumed intention of Congress, where Congress has not spoken [citations omitted], the result is the same."

Congress certainly has not spoken explicitly on the question of whether racial segregation in an interstate bus terminal, enforced by state arrest and conviction in the courts, burdens interstate commerce. *Morgan* v. *Virginia*, *supra*, has held that Congress has not spoken on the closely related issue of racial segregation on interstate buses, 328 U.S. 373, at p. 386 (" . . . there is no federal act dealing with the separation of races in interstate transportation. . . ."). While certain provisions of the Motor Carriers Act (49 U.S.C. §316(d)) are analogous to the Interstate Commerce Act provision (49 U.S.C. §3(1)) by which this Court struck down dining car, *Henderson* v. *United States*, 339 U.S. 816 and Pullman car segregation, *Mitchell* v. *United States*, 313 U.S. 80, *Morgan* may be taken as a determination that congressional intent on the precise question of race discrimination in interstate bus travel is at least not

sufficiently express to conclude this case by itself. As in *Morgan*, this Court here, petitioner submits, should strike down the burden on commerce in the absence of contrary indications of intent from Congress.

The Court, however, by letter to counsel for Respondent has inquired concerning "the intercorporate relationship between the Trailways Bus Company and the Trailways Bus Terminal, Inc., set forth in any documents of which the Virginia courts can take judicial notice." Appendix A to Respondents' Brief in Opposition, p. 12. To Petitioner, this perhaps indicates interest by the Court in the question of congressional intention as it may have been expressed in the Motor Carriers Act. Title 49, §303(19) of that Act provides that its terms apply to services and transportation, which includes "facilities and property operated or controlled by any such carrier," and §316(d) of the Act contains an "undue preferences" and "prejudices" provision like that which this Court treated in *Henderson*, *supra*, when dealing with rail travel. These Motor Carriers Act provisions have been construed in *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769 (1955), as imposing upon bus carriers requirements concerning race like those the Interstate Commerce Act places on railroads. Under these circumstances it might be argued that the Motor Carriers Act expresses congressional intention concerning the discrimination involved in this case. That Act, so interpreted, might apply here, specifically, if the Richmond Trailways Terminal were "operated" or "controlled" by a carrier.

Petitioner submits that, if *Morgan* does not conclude the issue, whether the Trailways Bus Company and the Trailways Bus Terminal are sufficiently related to place the Terminal explicitly under the Motor Carriers Act, or not, the result is the same, for the intention of Congress, as it

treats the problem of this case, must be regarded as the same for either situation.

Should the first condition obtain (*i.e.*, the Terminal is "operated or controlled" by a carrier), obviously the expressed intention of Congress is that such racial impediment is impermissible if there is to be an unburdened flow of commerce among the states. Should the second condition obtain (*i.e.*, the terminal is not operated or controlled by a carrier), it cannot be assumed that Congress meant to remit all of the interstate terminal's multifarious acts, as regulated by the myriad provisions of the Motor Carriers Act, no matter how burdensome to interstate commerce, to the unfettered discretion of the terminal management or state law enforcing that discretion. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28, which sustained a state anti-discrimination law as applied to foreign commerce, when contrasted to *Morgan*, *supra*, demonstrates the importance attached to keeping the channels of movement among the states free from racial impediments. Therefore, validation of segregation in these channels is not merely to be assumed. Surely, if Congress intended to commit to state law the matter of racial segregation, enforced by state laws in the midst of an interstate bus journey, this intention would have been pronounced quite explicitly. But such a pronouncement would raise serious Fifth Amendment questions (see *Morgan* v. *Virginia*, 328 U.S. 373, 380—"Congress, within the limits of the Fifth Amendment has authority to burden commerce"; *Secretary of Agriculture* v. *Central Roig Refining Company*, 338 U.S. 604, 616—"not even resort to the Commerce Clause can defy the standards of due process"; and see *Bolling* v. *Sharpe*, 347 U.S. 497); however, there is no evidence of such intention and none should be imputed to Congress, especially in the light of the constitutional questions this would raise. Therefore, even in the case of an interstate terminal not "operated

or controlled" by a carrier, a racial burden like that inflicted on Boynton by the Commonwealth of Virginia, unconstitutionally burdens commerce.

In any event, the terminal in question is owned by Trailways Bus Terminal, Inc., whose officers and directors, in 1959, with one exception, were all also officers or directors of either Carolina Coach Company or Virginia Stage Lines, both interstate carriers.[9] Petitioner is depositing certified copies of the relevant corporate charters and annual reports with this Court.

While the Virginia Attorney General has concluded that the Virginia courts would not take judicial notice of these charters (Brief in Opposition, p. 4), petitioner assumes that the Attorney General would not deny the validity of these documents. In either event, the result, petitioner submits, is the same.

II.

Petitioner's criminal conviction which served only to enforce the racial regulation of the bus terminal restaurant conflicts with principles established by decisions of this Court, and thereby violates the Fourteenth Amendment.

Beyond question, petitioner was arrested by the police and convicted by the courts, pursuant to state statute, to enforce the racial segregation demanded by the Trailways Terminal restaurant. Petitioner contends that this punishment violates Fourteenth Amendment rights in that it amounts to governmental enforcement of racial segregation. See, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1, 18, in which the issue was whether judicial enforcement of privately

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9 Hitchcock's Mass Transportation Directory (1959-60 ed.), 205 (Carolina Coach Co.); 242 (Virginia Stage Lines) indicates clearly the interstate character of these carriers.

arrived at racial restrictive covenants violated the Fourteenth Amendment. There the Court held that judicial enforcement of racial discrimination violates the Fourteenth Amendment:

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

The only contention advanced by respondents in response to this aspect of the petition for writ of certiorari seems to argue that because the discrimination originated in a "private" directive, *i.e.*, that of the restaurant management, Bruce Boynton's criminal conviction is not that sort of state action which the Fourteenth Amendment interdicts. Respondent relies on the theory expressed in *Williams* v. *Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir., 1959). Apart from the fact that that restaurant was hardly so integral a part of commerce as the one involved in this case, and that petitioner here had no reasonable alternative, but had to finish a meal quickly in the terminal and resume his bus trip, petitioner, here, seeks not relief against the restaurant, but immunity from conviction by the State and its attendant consequences, especially for one who is a law student.

Marsh v. *Alabama*, 326 U.S. 501, 505-06, stated a fundamental rule that:

> . . . the corporation's property interests do not settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

The terminal restaurant was open to that portion of the interstate traveling public of which petitioner was a part. Indeed, it exists principally, and was built into the terminal, to serve bus riders who travel on interstate buses that make stops in Richmond. It fairly may be stated that petitioner and other travelers did not seek out the terminal; rather, they were carried into it by interstate buses for refreshment without which interstate bus travel would be impossible or highly inconvenient. Reasoning like that employed in *Marsh* has struck down trespass prosecutions for picketing in Pennsylvania Station, New York; for picketing in a Maryland shopping center, and for similar conduct in a Washington State shopping center.[10] These decisions, for similar reasons, should apply here.

Boman v. *Birmingham Transit Co.*, *supra*, p. 12, also interdicts, under the Fourteenth Amendment, state criminal prosecution in support of privately declared racial regulation on local buses, even though the statute in question it-

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10 See n. 5, *supra*.

self made no mention of race. While some reliance there is placed on the fact that the buses were franchised, it is not so much the documents of franchise but the exclusivity which they evidenced that controls, petitioner submits. Under the circumstances of this case we have similar exclusivity.

Any weighing of reasonable alternative action that might have been taken by petitioner, cf. *Breard* v. *Alexandria*, 341 U.S. 622, 644 (magazines may sell subscriptions without door-to-door solicitation); *Republic Aviation* v. *N.L.R.B.*, 324 U.S. 793, 801, note 6 (employees denied full freedom of association in "the very time and place uniquely appropriate"), shows that his only choice was to remain hungry or submit to racial segregation, inconvenience, and humiliation.

The inquiry in a case such as this, therefore, does not begin and end with a determination of where the legal title or possessory interest lies. As in the National Labor Relations Act cases, discussed *supra*, pp. 10-11, the question is one involving other factors as well. Here, as in *United Steelworkers* v. *N.L.R.B.*, 243 F.2d 593, 598, petitioner was "lawfully within" the terminal. He behaved himself well. There was no disorder, nor was there any breach of the peace. He believed, with reason, that he had a right to the service he sought. There was no reasonable alternative action for him to take.

It cannot be argued seriously that to uphold petitioner's conviction is necessary and reasonable for the maintenance of law and order, and that, therefore, the statute in question, as applied to petitioner in these circumstances, does not violate the Constitution.[11] The common law never pro-

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11 Compare *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U.S. at 253. ("To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.")

scribed as trespass conduct such as petitioner's—*i.e.*, conduct which did not cause breach of the peace and which was taken under a claim of right. Most other states, as footnote 3, indicates, would not have punished petitioner's conduct, either because those states have no statute covering "trespass" after refusal to depart from premises such as the terminal, or because they recognize "claim of right" as a defense, or because, in view of common law and general interpretations of this type of statute, it reasonably may be assumed that they would recognize a peacefully asserted bona fide claim of right. Neither does England or the Commonwealth countries punish conduct such as Boynton's, except, instructively, South Africa, where a statute, directed against Natives makes criminal deeds like petitioner's.

This Court, petitioner submits, should not uphold as a crime, petitioner's peacefully asserted, reasonable claim to equality in the course of a journey in interstate commerce. Virginia's action has no foundation in reason, other than to uphold race discrimination. The judgment below denies equal protection of the laws.

CONCLUSION

Wherefore, for the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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